No. 77-1858

In the Supreme Court of the United States

OCTOBER TERM, 1978

DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF TEXAS, PETITIONER

v.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1181

DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF TEXAS, PETITIONER

v.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This case concerns a dispute arising under provisions of the Social Security Act that provide matching funds to states that have submitted plans to the Secretary of Health, Education, and Welfare providing for social services to the aged, blind and disabled. Petitioner submitted such a plan to the Secretary, who approved it (Pet. App. A-5). The Secretary later concluded that certain services provided by petitioner were not authorized by the plan, and he accordingly declined to reimburse petitioner for the approximately $92 million expended for these services (*id.* at A-9).

Petitioner then filed this suit, contending that the Secretary erred in failing to afford an evidentiary hearing

and that the $92 million should be paid pending the hearing. The district court ordered the Secretary to provide petitioner with a hearing, but it declined to order that the funds be paid to petitioner in the interim (388 F. Supp. 1304; Pet. App. A-15 to A-25). Both parties appealed, and the court of appeals substantially affirmed the district court's decision (556 F. 2d 326; Pet. App. A-1 to A-14).

Congress now has enacted legislation that terminates the dispute between the parties. Pub. L. 95-291, 92 Stat. 304 authorizes the payment of funds to settle this and similar claims asserted by the states involved.[1] Although this case would not become moot until the funds have been appropriated and paid,[2] the new legislation deprives this case of any prospective significance it may once have had. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1978.

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[1]Pub. L. 95-291 is reprinted as an appendix to this memorandum.

[2]We expect the case to become moot before the end of the year. The Senate has passed a bill (H.R. 12930, 95th Cong., 2d Sess. (1978), the Treasury, Postal Service, and General Governmental Appropriations bill) that appropriates the monies necessary to carry out Pub. L. 95-291. See 124 Cong. Rec. S9888 (daily ed., June 27, 1978). The House version of this appropriations bill was passed before the President has signed Pub. L. 95-291, and it therefore does not contain funds for the new statute. 124 Cong. Rec. H5097 (daily ed. June 7, 1978). The appropriations measure now is being considered by a conference committee, and we are informed that the appropriations necessary to carry out Pub. L. 95-291 are expected to be included. The new statute then requires payments to be certified and made expeditiously.

DOJ-1978-07

APPENDIX

Ninety-fifth Congress of
the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on
Thursday, the nineteenth day of January,
one thousand nine hundred and seventy-eight

AN ACT

To authorize an appropriation to reimburse certain expenditures for social services provided by the States prior to October 1, 1975, under titles I, IV-A, VI, X, XIV, and XVI of the Social Security Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) there is authorized to be appropriated for the fiscal year which ends on September 30, 1979, not to exceed $543,000,000, to remain available until expended, to enable the Secretary of the Treasury to pay to any State the amount determined by the Secretary of Health, Education, and Welfare (hereinafter in this Act referred to as the "Secretary"), in accordance with the succeeding provisions of this Act, to be payable to the State in settlement of the unpaid claim of the State against the United States for reimbursement of expenditures made by the State prior to October 1, 1975, with respect to services (and related administrative costs) which the State asserts were provided (or incurred) under an approved State plan pursuant to title I, IV-A, VI, X, XIV, or XVI of the Social Security Act.

(b) For purposes of this Act, the term "unpaid claim" of any State means (subject to the succeeding sentence) the total amount of Federal reimbursement for expenditures of the type specified in subsection (a) which has not been paid to such State prior to the date of

enactment of this Act. In determining such total amount in the case of any State, any portion thereof attributable to expenditures made in any fiscal year with respect to which the provisions of section 1130 of the Social Security Act (as then in effect) were applicable shall be reduced (but not below zero) by the excess (if any) of (1) the aggregate of the portion of such total amount attributable to expenditures made in such year and the total amount of the Federal reimbursement paid prior to the date of enactment of this Act to such State with respect to expenditures made in such year, over (2) the State's allotment determined under such section 1130 for such year.

SEC. 2. (a) In the case of that portion of the unpaid claim of a State that the Secretary determines was asserted against the United States, in the form and manner prescribed by the Secretary with respect to the filing of claims under titles I, IV-A, VI, X, XIV, and XVI of the Social Security Act, prior to April 1, 1977, the Secretary shall certify to the Secretary of the Treasury for payments to the State the sum of—

(1) an amount equal to 38 percent of so much of such portion as does not exceed $50,000,000;

(2) an amount equal to 35 percent of so much of such portion as exceeds $50,000,000 but does not exceed $150,000,000; and

(3) an amount equal to 21 percent of so much of such portion as exceeds $150,000,000;

except that the percentage specified in paragraph (1) shall be 58 percent and the percentage specified in paragraph (2) shall be 50 percent in the case of a State if the portion of the unpaid claim of such State referred to in the preceding provisions of this subsection equals or exceeds 85 percent of the sum of (A) such portion and (B) the

total amount of Federal reimbursement for expenditures of the type specified in the first section of this Act which has been paid to such State prior to the date of enactment of this Act but with respect to which formal steps have been initiated by the Secretary to recover such reimbursement.

(b)(1) In the case of the portion of the unpaid claims of a State that the Secretary determines meets the requirements of subsection (a), except that the claim was asserted, in the form and manner prescribed by the Secretary, on or after April 1, 1977, but prior to the ninety-first day following the date upon which this Act is enacted, the Secretary shall certify to the Secretary of the Treasury for payment to the State, subject to paragraph (2), an amount equal to 15 percent of so much of such portion as he finds to be for the provision of services that he finds the State provided and for which he has not provided reimbursement, but the expenditures for which were reimbursable under title I, IV-A, VI, X, XIV, or XVI of the Social Security Act prior to April 1, 1977, or, if not services the expenditures for which were reimbursable, are services of a similar kind and are not otherwise reimbursable under this Act.

(2) The secretary may not certify for payment to any State under the authority of this subsection an aggregate amount that exceeds 5 percent of that State's allotment for the fiscal year 1973 of social service funds under titles I, IV-A, X, XIV, and XVI of the Social Security Act, as determined in accordance with section 1130(b) of such Act, less the amount certified for payment to the State under subsection (a) of this section.

(3) The Secretary shall have no authority, by regulations or otherwise, to extend the time period specified in paragraph (1) or to waive the time limit for assertion of a claim.

SEC. 3. (a) Except with respect to amounts paid by the Secretary to a State prior to April 1, 1977, no State is entitled to reimbursement of expenditures described by

the first section of this Act, except as provided by this Act.

(b) Neither the Secretary nor any other official of the Federal Government may seek to recover any amount paid to a State prior to April 1, 1977, or pursuant to this Act, as reimbursement of expenditures made by the State of the type described by the first section of this Act.

SEC. 4. (a) The Secretary is authorized to enter into agreements with any State in accordance with the provisions of this Act, and agreements entered into prior to the enactment of this Act, to the extent not inconsistent with the terms hereof, shall have the same force and effect as agreements entered into subsequent to enactment of this Act.

(b) In the absence of an agreement, a State dissatisfied with a determination by the Secretary under this Act may, by application to the Secretary within 60 days after the date of notice to the State of that determination, obtain the Secretary's review of that determination. If the application requests a hearing, the Secretary shall conduct a hearing after reasonable notice to the State, and shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his determination. If the Secretary does not preside at the reception of the evidence at the hearing, the decision of the presiding official or body shall be the decision of the Secretary.

(c) No court of the United States has jurisdiction to entertain any action seeking the review of any determination or finding of the Secretary under this Act, or otherwise seeking to compel a determination by the Secretary to certify for payment any claim described by the first section of this Act; except that the appropriate district court shall have jurisdiction over any action seeking enforcement of an agreement of the kind referred to in subsection (a).

SEC. 5. (a) Amounts appropriated under the first section of this Act shall be first applied in settlement of the portions of unpaid claims described in section 2(a). If, after that payment, the amounts remaining are insufficient to pay the amounts established by section 2(b) with respect to the portions of unpaid claims asserted under section 2(b), the Secretary shall certify for payment with respect to each such portion an amount that bears the same relationship to that portion as the total of such remaining available amounts bears to the total of all portions of unpaid claims asserted under section 2(b).

(b) A reduction effected by subsection (a) of this section in the amount payable to a State under section 2(b) does not give rise to an entitlement of the State to the difference between the amount payable under section 2(b) (without regard to subsection (a) of this section) and the amount payable under section 2(b) after application of subsection (a) of this section.

(c) In the event that the amount appropriated pursuant to the first section of this Act exceeds the payable portions of unpaid claims under subsections (a) and (b) of section 2, the amount paid to any State receiving a payment computed with respect to paragraph (3) of section 2(a) shall be increased (to the extent of such excess) by an amount equal to the difference between the amount it received under section 2(a) and the amount it would have so received if the percentage in such paragraph had been 25 percent.

SEC. 6. The Secretary of the Treasury shall pay to each State, out of amounts appropriated pursuant to the first section of this Act, all amounts certified by the Secretary as payable to that State under the terms of this Act.